A Newsletter for Law Client Protection Funds

The Client Protection Webb

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Twenty-Seven Years of Law Client Reimbursement in the United States

By William Ricker

Every three years the ABA Standing Committee on Client Protection surveys the 61 U.S. and Canadian law client protection funds to determine the status of this important professionalism program. Starting with the first survey in 1978, we now have twenty-seven years of data on the funding, reimbursements and operations of client protection funds in the United States, and fifteen years of similar data for the Canadian provinces since 1990. This article will summarize a review of those 27 years of data, but because of the significant differences in the structure and operation of funds north and south of the border, this article will only analyze the fifty-one U.S. jurisdictions.

Due to inconsistent reporting by the funds and variations in information requested in the early surveys, the data collected prior to 1990 is much sketchier than the data collected over the last 15 years. In the early surveys only about two-thirds of the U.S. jurisdictions returned responses to the survey, while for the last five surveys, with the exception of the 1999-2001 survey, at least ninety percent of the U.S. jurisdictions responded. But even though we have fairly good data over the last five triennia, we only have fifteen years of complete data for nineteen U.S. jurisdictions[1], with another eleven jurisdictions providing responses in four of the last five surveys[2].

Because of the inconsistency in reporting in the early surveys, it is difficult to make comparisons over the entire 27-year period. Nonetheless, interesting information is revealed. For instance, U.S. jurisdictions have reported reimbursing $361,967,307 to clients in the last 27 years. In 1978, 20 jurisdictions reported reimbursements totaling $1,907,029; in 2004, 48 jurisdictions reported $29,270,430 in reimbursements. Every U.S. jurisdiction has reported reimbursing at least some clients over the last 27 years. Wyoming is lowest with total reported reimbursements of $9,530 and New York is highest with $106,645,782. Two states have dominated the amount reimbursed in each of the nine surveys, but which two states has changed over the years.

The annual amount reimbursed per attorney has risen dramatically from the $2.93 in the first survey in 1978-1981 to the $19.92 reported in the 2005 survey. The highest annual reimbursement per attorney of $22.16 was reported in the 1999 survey. Payments are concentrated in a few states even when lawyer population is taken into account. For instance, over the last 27 years in only nine states[3] has the state's percentage of the total of reimbursements to clients exceeded its percentage of the total number of attorneys.

Over the last fifteen years of surveys, the 51 U.S. jurisdictions reported reimbursements of $310,602,348, or 86% of all of the reported reimbursements since the ABA began collecting data. The 19 jurisdictions with fifteen years of complete data since 1990 account for 85% of the $310,602,348 distributed by all U.S. jurisdictions over that period of time; while the eleven U.S. jurisdictions that have reported in four of the five most recent surveys account for an additional eight percent of the reported total.

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TWENTY-SEVEN YEARS

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Twenty-six U.S. jurisdictions have distributed more than one million dollars each over the last fifteen years. New York leads with almost $95 million in reimbursements, followed by California with more than $60 million. New Jersey has distributed $35 million; Pennsylvania more than $26 million; Massachusetts more than $16 million; and Florida almost $12 million. Only North Dakota has reported no reimbursements over the last 15 years. Mississippi is next lowest with $7,500, followed by Utah with a 15-year total of $12,862.

The 19 states for which we have 15 years of data reported a $19.92 average annual reimbursement per attorney for the 1990-1992 triennium. In the most recent triennium, 2001-2004, those same states reported an average annual reimbursement per attorney of $26.04—a 31% increase over the 1990-1992 average. Over the same period, there was a 67% increase in the 19 states' total payments to clients. When the data for all 30 jurisdictions that have reported in at least four of the last five triennium is analyzed, the average annual reimbursement per attorney in 2001-2004 was $22.44, up from $16.63 in 1990-1992. The total dollars reimbursed per triennium rose 71%. Those 30 jurisdictions account for 85% of the attorneys in all of the reporting jurisdictions.

Although the 19 states considered above account for 85% of all reimbursements over the 15-year period, they account for only 64% of the lawyers. The six states (NY, CA, NJ, PA, MA and FL) that have reimbursed at least $10 million each account for 46% of the lawyers but 79% ($245,217,235) of the total dollars reimbursed by all U.S. jurisdictions.

Even more dramatically, two states, New York and California, account for almost exactly half of all reimbursements over the last 15 years, but for only 27% of the lawyers. The percentage of total reimbursement and the percentage of lawyers for other major funds are: New Jersey, 11% of total reimbursements with five percent of the lawyers; Massachusetts, five percent of total reimbursements and four percent of the lawyers; Pennsylvania, eight and a half percent of total reimbursements and four percent of the lawyers; and Florida, four percent of reimbursements and slightly more than five percent of the lawyers. Analyzing jurisdictions at the low end of the study reveals very little useful information except that their percentage of reimbursements almost always lags far below their percentage of lawyers.

Although the total reimbursed by U.S. jurisdictions over the last 15 years is nearly a third of a *billion* dollars, this analysis does not tell us whether the disparity in reimbursements among the jurisdictions is due to inconsistent reporting, actual concentration of losses in just a few states, or the failure or inability of many funds to satisfy the needs of their law clients, or all of the above.

Examining the percentage change in total dollars reimbursed from one triennium to the next is a roller coaster ride. The increase of the 1993-1995 triennium over the 1990-1992 triennium was 20%, while total reimbursements for the next triennium ending in 1998 jumped 41 percent. However the following triennium total dropped seven percent from the triennium ending in 1998. The last triennium showed an 18% increase in total reimbursements over the triennium ending in 2001, but only an 11% increase over the triennium ending six years earlier.

If the slowing increases in total reimbursements are the result of improved prevention programs such as trust account overdraft notification, random audits, and third party and mortgage payee notification, it is because of efforts in the six states that dominate total reimbursements. During the 1999-2001 period when the total of reimbursements for all jurisdictions decreased, reimbursements for all jurisdictions excluding the big six actually increased by more than 35%.

There is likely much more that could be mined from an in depth analysis of the ABA's triennial surveys. With more than a third of a billion dollars of lawyers' contributions having been disbursed in the last quarter of the Twentieth Century, it is time for a much more serious study of law client protection fund funding and reimbursements than I am able to give it.

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[1] CA, DE, FL, HI, IA, ID, MD, MI, MO, NC, NJ, NY, OH, OR, PA, SC, VA, WA and WI.

[2] AK, AR, AZ, CT, DC, GA, IL, KS, MN, MT and RI.

[3] CA, CT, DE, HI, MA, NC, NJ, NY, and PA.

Editor's Note: Mr. Ricker's data is contained on an Excel spreadsheet available for the asking (***wricker@ix.netcom.com***). Copies are also available from the ABA's John Holtaway (***Jholtaway@staff.abanet.org***).

COMMENTARY *By William Ricker*

As shown by the accompanying article analyzing nine ABA triennial surveys, the lawyers of the United States have much to be proud of—in fact one-third of a billion dollars worth of pride. But the surveys also show that there is still much to be done. It is not reasonable to assume that one-half of all lawyer theft occurs in just two states. The more plausible explanation is that there are only a few states adequately addressing an obviously real problem in our profession.

While the twenty-seven year reimbursement total is worth celebrating, that third of a billion dollars is a measurement of the minimum loss suffered by clients. For instance, we know the surveys understate the real total because some active funds simply have not participated in the ABA surveys. We also know from the surveys that not only are many losses not covered for various reasons—some purely arbitrary to protect the "viability" of funds—but many others are reimbursed only in part because of per claim or per lawyer limits—again designed to protect the "viability" of funds. It is not possible to know the true monetary loss to clients, but it is far more than a third of a billion dollars. The loss of integrity to the legal profession and damage caused to clients' lives is incalculable.

It is also not reasonable to assume that most of the bad lawyers in this country practice in two or even a handful of states. While there is certainly a concentration of lawyers in a minority of states, and perhaps a concentration of economic activity as well, the ABA surveys still demonstrate that too many states cannot be adequately addressing the problem of lawyer theft. The surveys show that too many states have embarrassingly low reimbursement limits, clearly inadequate lawyer contributions, and insufficient prevention programs as simple as trust account overdraft and insurance payee notification.

So what is to be done? The first step, and the easiest, is for *all* jurisdictions to fully report the activities of their funds in future ABA

triennial surveys, including the one recently sent by the Standing Committee. It may not be possible to create missing information from the past, but we should ensure that we have a complete set of data going forward. Information is knowledge; every jurisdiction that does not complete the survey unnecessarily diminishes our set of knowledge.

The next step is for every jurisdiction to immediately adopt the theft protection programs promulgated in the ABA model rules on client protection. Every dollar saved by preventing theft saves many times its value in life altering grief to clients and damage to the legal profession.

The third step is for all jurisdictions to fully embrace the Standards adopted by NCPO at its 2006 annual meeting. It is not reasonable to believe that the eleven states that report having reimbursed less than two dollars per lawyer annually over the last 27 years can be meeting the client protection needs in their jurisdictions. It is equally unacceptable that more than half of all jurisdictions report having reimbursed less than five dollars per lawyer per year in that period. All jurisdictions should be "fully reimburse[ing] all clients victimized by the dishonest conduct of their lawyers in as timely a manner as possible." Standard 4.1.

Finally, it is time to make a serious academic study of client protection funds. It is time for all U.S. jurisdictions to realistically face up to the problem of lawyer theft. It is time to work to prevent lawyer theft and it is time to fully reimburse client losses when prevention does not work. It is time to stand up and be counted.

▶*Mr. Ricker served many years as a Trustee of the Florida State Bar's client protection program, and is a former President of NCPO.*

Have you completed the ABA Triennial Survey?

When is Stealing a Client's Funds Malpractice? An Issue to Contemplate

By R. Minto, Jr.

There are many days when I just don't know what hat to put on in the morning when I get up. I am a lawyer, I am a member of the Board of the Montana Fund for Client Protection and I am the CEO of a lawyer's professional liability insurance company. This morning was one of those days. I had committed to writing another (hopefully) thought-provoking article for *The Client Protection Webb*. I also had to prepare for a meeting with a client that I accepted by referral from our local Legal Service Office (after all, even those of us in corporate law still have the obligation to do our part to provide access to justice for all). Lastly, I had a conference call scheduled with several of my company's reinsurers to discuss their concern with our industry's growing exposure to claims related to lawyer trust account theft.

Wait a minute—isn't trust account theft a Fund for Client Protection issue? Well yes, but the conundrum occurs when we ask the question differently. When is trust account theft a malpractice claim? The answer is quite simple—when the offending lawyer is a member of a firm with malpractice insurance. Ah yes, good old innocent-partner coverage—no wonder my reinsurers are unhappy. How can there be any innocent partners when the account is a commingled trust account? Aren't all partners, if not all lawyers, in the firm equally responsible for the ethical and proper maintenance of the trust account? How then can there be innocent partners? Are they not equally at fault for not minding the store? I see the reinsurers' concern, but wait: are we as insurers treating all our insured lawyers equally? If we will pay for trust fund defalcation for firms of two or more lawyers, why shouldn't we also pay for those who choose to practice alone?

Answer—well (with only a slightly straight face) if money disappears from the trust account of a lawyer in solo practice, it is theft (excluded as an intentional act), but if it happens in the firm setting only one of the lawyers is a thief (still excluded for that lawyer's liability). However, all the remaining firm members have coverage as they were just sloppy, inattentive, unobservant or negligent in the supervision of the theft (oops—I really meant maintenance of the firm's trust account—my mistake), and the firm's clients deserve to be protected from the innocent partners' negligence.

All kidding aside, this issue is coming up more frequently than you might imagine and the answers, regardless of which side of the question you come from, do not make much sense. Logically, we insurers could solve the problem by making a clear and fast exclusion from our policies that says "theft is theft; it is intentional and not covered by innocent-partner coverage." From the client protection fund side, that doesn't seem like a really good option as what will it do to the demand for reimbursement? With many of these claims amounting to millions of dollars, the picture is not pretty if that exclusion becomes the rule. From the Bar's perspective, is it fair to assess all lawyers for a fund that only benefits clients of solo practitioners? I suspect that a poll of Bar members would give a pretty clear answer—No!

So what is the answer? I'm not sure that there is a good one, but consider a form of comprehensive client protection where the role of the client protection fund is partially but fairly spread at the feet of the professional liability industry. (Listen very carefully; if you are really quiet you can hear all of my insurance industry affiliations being revoked simultaneously). What would be wrong with asking the industry to create coverage as a sub-limit of liability under the common professional liability policy that would protect the clients of all insured lawyers—solos and firm members alike—against trust account theft (the risk can be rated—we already do for firms)? Really nothing, except that such a solution does not solve the problem for the profession. What about the uninsured? We would still need to have client protection funds for the socially irresponsible among us (I am speaking of those lawyers who don't care about protecting their clients and those that are perfect and never make mistakes). Well, perhaps there is a way to make it work in three easy steps:

(1) State Bars mandate that lawyers must disclose on their annual license renewal whether or not they have LPLI coverage and if so the name of the company.

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When is Stealing CONTINUED FROM PAGE 3

(2) Insurers agree to create the sub-limit discussed above and to notify the Bar if a policy is canceled or non-renewed.

(3) The Bar assesses (all uninsured lawyers) on behalf of its client protection fund (payment is a condition precedent to license renewal), an actuarially determined sum adequate to provide and administer theft protection for the clients of such uninsured lawyers in an amount equal to that provided by LPLI coverage.

It seems like "Big Brother" is at it again, but maybe we need a "Big Brother" to sort out this mess and provide fair and uniform client protection for victims of lawyers who steal from clients.

▶*Mr. Minto is President and CEO of the ALPS Corporation in Missoula, Montana.*

PA Fund in Bankruptcy Court

By Kathryn Peifer

The Pennsylvania Lawyers Fund for Client Security has found itself in Bankruptcy Court in the Western District as attorneys seek to discharge their obligations to the Fund and circumvent Pennsylvania Rule of Disciplinary Enforcement 531. Rule 531 requires that the Fund be fully reimbursed for all awards to former clients, plus 10% interest, before the attorney may be reinstated. Regulations require compliance with Rule 531 before filing for reinstatement.

The Fund vigorously seeks nondischargeability of any obligation owed by a former attorney to the Fund. Recent holdings in the Bankruptcy Court have both helped and potentially harmed these efforts.

By Memorandum Opinion filed April 24, 2007 in *Pennsylvania Lawyers Fund for Client Security v. George A. Baillie*, the Bankruptcy Court held that a filed claim, and the Fund's decision in it, were not proceedings "against the debtor", and therefore did not violate the automatic stay. The Court also held that even if the processing of a claim were determined to be against the debtor, such proceedings would fall squarely within the exception at Sec. 362(b)(4) of the Bankruptcy Code. That's the good news.

Here's the bad news: the Bankruptcy Court held that admissions in a Resignation Statement and attached exhibits did not invoke collateral estoppel. The Court held there was no final judgment entered against the attorney, even though the Supreme Court of Pennsylvania entered an Order disbarring him. Therefore, the Fund was required to prove the misconduct of the debtor/attorney, who would not be precluded from contesting material facts admitted in the disciplinary proceedings.

More bad news: the Bankruptcy Court held that money received by an attorney from a third party, representing reimbursement to the client of legal fees, was not "entrusted" to the attorney. Since the failure of the attorney to return the retainer fee was only a breach of contract, went the reasoning, it was not a breach of a fiduciary duty; therefore, the debt was dischargeable.

Considering the issues more significant than the amount involved, the Fund stressed the facts in an appeal to the U.S. District Court. The client had paid the debtor/attorney a $500 retainer to represent the client in a dispute with a neighbor. The matter was eventually settled. As a part of the settlement, the defendant paid to the attorney the $500 legal fee previously paid by the client. To allow the debtor/attorney to keep the $500 reimbursement of legal fees would result in him "double-dipping" regarding fees earned. Since the $500 legal fee was to be paid over to the client, the Fund argued,

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MAJOR PROGRESS ON CAPS IN NEVADA

When your Fund's per attorney cap is set at $25,000 per year and you decide that's too small, it would be reasonable to increase it by doubling, tripling, or even quadrupling. But Nevada reports it did the right thing! In accordance with the ABA *Model Rules*, the NCPO *Standards*, and the 1999 Conference of Chief Justices' *National Action Plan*, Nevada *eliminated* their per attorney cap. They also increased their per claimant cap from $15,000 to $50,000 and created an additional source of revenue by collecting $50 of every approved pro hac vice applicant's fee (currently set at $500).

— *Georgia Taylor*

Finding Dishonest Conduct in Unearned Fee Claims

By Kenneth Bossong

The special difficulties presented by investment claims were discussed in articles published in the Winter and Fall 2002 issues of *The Client Protection Webb*. Nearly as disquieting, and often more numerous, unearned retainer claims present challenges of their own. The good news is that, unlike investment claims, unearned fees seldom involve much of an issue as to attorney-client relationship. The finding of dishonest conduct is what makes these claims so difficult.

How These Claims Arise

While there can be large unearned fee claims, most are smaller than other categories. Yet, these claimants seem to feel as violated as any victims we meet. That is not so surprising, considering what has happened: the claimant has brought a significant, stressful matter to a lawyer—divorce, child support, defense of criminal charges, perhaps—and at some point, is left abandoned. At best there has been delay, increasing the stress involved; often claimant's position is compromised or even ruined. Meanwhile, the money paid in advance toward fees is gone. Some claimants have no way of raising the money to hire a replacement.

The Range of Claims

It is often helpful when considering difficult claims to start with two extremes in the kinds of claims that tend to be presented. At one end of the spectrum is "take the money and run": the lawyer who has taken as much money from as many people as possible and has disappeared having done nothing for any of them, often just before being suspended or disbarred. Most would agree that this is theft, pure and simple.

At the other extreme, we have clients displeased with the way a matter was handled or the results obtained. These are claims of malpractice, if anything, not compensable by client protection funds. Also in this realm are situations where clients simply feel they were overcharged; fee arbitration mechanisms are more on point here than protection funds. The shorthand for this is that the fund does not pay fee disputes or malpractice claims. The temptation to resist is allowing the shorthand to take the place of analysis by simply labeling every claim having to do with a fee as a "fee dispute".

In Search of a Standard

Devising a useful standard for analysis of unearned fee claims that will yield just results is surprisingly tricky. The standard also tends to evolve. In trying to conceive of what one is looking for by way of dishonest conduct, one often starts, understandably enough, with something like this: "Did the lawyer take the advance fee intending not to perform the services?" Sounds reasonable enough, but problems quickly arise.

How, for example, are we to know the intent of the lawyer? Once or twice a decade a fund may have a claim where a lawyer admits there was no intent to perform services at the time the fee was received. In all other claims, it can only be inferred from the circumstances. So this becomes another category of claim that is quite fact sensitive. But there is more.

Why must the intent not to perform have been present at the time the fee was received? In other words, why must dishonesty be from the very outset, in these claims only? Indeed, is intent really the key at all? Why do we need a kind of "mens rea", in these claims only? If we must infer dishonest intent from the circumstances anyway, isn't the focus more properly on the *objective behavior* of the lawyer rather than state of mind? Funds don't concern themselves with what lawyers who raid their trust accounts are thinking about; like the lawyers in these unearned fee claims, they are probably thinking about the loan shark who has threatened various body parts.

All or Nothing?

Some fund trustees are comfortable inferring dishonesty only where the lawyer has done absolutely nothing for the client, and has returned none of the money. The result is what is sometimes referred to as a "one paper rule". That is, if the lawyer produced one document on behalf of the client, there will be no finding of dishonest conduct. Another variation focuses more on time: if the lawyer spent any time at all on the client, the claim is rejected.

Again, there are problems. Why should only these claims be all or nothing? What if whatever minimal time or efforts expended were more about lawyers covering their tracks than performing any services for clients? When faced with these factual scenarios, the standard then often evolves to whether or not any *significant* or *substantial* time was expended or any product *of value* resulted from the services rendered. Did the claimant derive any *benefit*? Did the lawyer do anything to further the client's cause?

Impact of Model Rule

Many states, and now (at NCPO's suggestion) the ABA Model Rules of Professional Conduct expressly require prepaid fees to stay in the trust account until earned. Funds in jurisdictions with this Rule might find dishonest conduct in the absence from a trust account of a fee paid but not yet earned. Should it be any different for funds in states that don't have this specific mechanism? Is keeping money that has not been earned any less objectionable in states that have not seen fit to require that it be maintained in a trust account? Are clients any less harmed?

A Suggested Approach

Consider the following standard: Did there come a point in the relationship between claimant and the lawyer when it was clear that the fee (or a significant, identifiable portion of it) was *clearly* not earned and never would be? If not, reject the claim for insufficient proof of dishonest conduct. If so, what did the lawyer then do? The failure to return that which was clearly not earned is dishonest conduct.

What factors do you look at? As many as can be gathered: the time and the amount of payments and whether they were to constitute the entire fee; the nature of the case and how it was left by the lawyer; how many meetings and major telephone calls claimant had with lawyer; whether there were any pleadings or other legal papers prepared or court appearances by lawyer. What, in short, did lawyer do, and fail to do? If claimant has a new lawyer, no one knows better what was left to be done and the value, if any, of what had been accomplished. A particularly good source of information is the adversary. If the other side's lawyer has never heard of the respondent in the claim being considered, that can be very helpful toward a finding of dishonest conduct. Finally, as with any close calls on difficult claims, a pattern of conduct can make a difference.

Amount of Loss

Closely related to the finding of dishonest conduct, if that hurdle is overcome, is deciding on the amount of the compensable loss. Where dishonesty is clear, often it will be the entire amount paid. The best help on this issue, when available, is what the new lawyer charged or is charging to clean up the mess left behind by respondent. If it is more than what claimant paid respondent, the award can go up to the full amount originally paid. If the new lawyer is charging less, however, the fund might wish to limit the award to the amount it takes to put the claimant in the position he or she would have been in had the lawyer acted honestly.

Where a lawyer has started some work and then stopped (for whatever reason) and fails or refuses to return the unearned portion, in such a way as to permit a finding of dishonest conduct, there is nothing wrong with Fund Trustees doing the best they can to place a value on what was done and awarding the balance. A reasonable claimant will see this as a just exercise of Trustee discretion.

Conclusion

Claims filed seldom resemble the easy ones at either extreme. The problem in difficult unearned fee claims (those where the lawyer has done some work, of questionable value) is that handling them *feels like* settling fee disputes. Whatever surface resemblance there may be, there is a meaningful distinction between finding dishonest conduct and determining "mere" fee disputes. The point was best made by a claimant years ago. The lawyer had charged him a fee of $8,000 and had done some work. Claimant had argued that the work done was worthless, while the lawyer placed a value of $2,000 on it. When the fund rejected the claim as a fee dispute, the claimant politely pointed out that they had a dispute in the value of lawyer services between $0 and $2,000; as between $2,000 and the $8,000 paid, there was no dispute. "If you buy [respondent's] position entirely, he has kept $6,000 to which he is not entitled." He was right, of course, and reconsideration resulted in a $6,000 award.

Any unease felt in handling these claims can be overcome by the satisfaction available knowing justice has been done with careful consideration of the facts in light of an appropriate standard.

▶*Mr. Bossong is director of the New Jersey Lawyers' Fund for Client Protection, and a former President of NCPO.*

Maryland Court Changes Review Procedure For Fund Decisions

By Leo Ottey, Jr.

Decisions of the Maryland Fund have always been appealable. But in November 2002 the Court of Appeals, Maryland's highest court, enacted a rule change significantly affecting the procedure for such appeals.

From the 1966 adoption of the court rule establishing what was then called the Clients' Security Trust Fund of the Bar of Maryland until the rule change, review of Fund decisions was governed by Maryland Rule 16-811(j)(2) which provided:

Judicial review. A claimant aggrieved by a final determination of the trustees denying his claim may, within 15 days thereafter, file exceptions in the Court of Appeals.

But in November 2002, while the Ong matter — discussed elsewhere —was pending before it, the Court of Appeals, abolished this "direct appeal" procedure by adopting a new court rule, designated as 16-811(***i***)(2). This rule provided:

Judicial Review. A person aggrieved by a final determination of the trustees with respect to a claim may seek judicial review of the determination pursuant to Title 7, Chapter 200 of these Rules. .... Any party, including the Fund, aggrieved by the judgment of the circuit court may appeal the judgment to the Court of Special Appeals [Maryland's intermediate appellate court].

Chapter 200 of Title 7 of the Maryland Rules provides generally for the judicial review of decisions of administrative agencies and directs that such review be made, in the first instance, by a trial court of general jurisdiction, called the circuit court. As amended in November 2002, the relevant rules provide:

(a) Applicability. The rules in this Chapter govern actions for judicial review of

(1) an order or action of an administrative agency, where judicial review is authorized by statute, and

(2) *a final determination of the trustees of the Client Protection Fund of the Bar of Maryland.*

(b) Definition. As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, commissioner, official, the Maryland Tax Court, or other unit of the State or of a political subdivision of the State *and the Client Protection Fund of the Bar of Maryland.* Md. R. 7-201 (emphasis added).

Thus, by this change in its court rules, the Maryland high court dispensed with the thirty-six year practice of entertaining direct appeals of right from decisions made by the Trustees of the Fund. Now, review of such decisions remain of right, but are treated in the same procedural manner as are reviews of decisions of executive-branch administrative agencies—to a trial court of general jurisdiction. The direct appeal procedure was doubtless a reflection of the 1966 Court's view of the role of the Fund as its own arm, exercising the judicial branch's traditional oversight function of attorneys. But this direct, of right, review procedure, though expressly authorized by its own court rule, was viewed in 2002 as constitutionally problematic. The Court of Appeals ordinarily exercises only appellate jurisdiction, i.e., review of a decision by *a court*. See *Ong v. Gingerich, et al.*, 371 Md. 574 (2002) (citing *Shell Oil Co. v. Supervisor of Assessments*, 276 Md. 36, (1975)). *Shell Oil*, relying on the Maryland Constitution and the doctrine of separation of powers and citing *Marbury v. Madison*, reasoned that, as the phrases "appellate jurisdiction" and "original jurisdiction" clearly connote, appellate jurisdiction does not arise until there is an initial exercise of judicial power or authority by a court. Appellate jurisdiction is the review of that initial exercise of judicial authority. 276 Md. at 41.

While the Maryland Client Protection Fund is certainly not an executive-branch administrative agency, and while it certainly functions to promote the judicial branch's centuries-long tradition of lawyer oversight, it is also not a court and does not exercise original judicial power. In respect of decisions of the Trustees of the Fund, judicial power is exercised in the first instance by a Maryland circuit court pursuant to the filing of a petition for judicial review. A person, including the Fund, has further review available of right to Maryland's intermediate court, followed by discretionary review by the Court of Appeals.

▶*Mr. Ottey is Counsel to the Client Protection Fund of the Bar of Maryland.*

The Long Story of Ong

By Leo Ottey, Jr.

Lye Ong was indicted in October 1997 with twelve charges relating to child abuse, assault, battery and sexual offenses and in April 1998 pled guilty to certain of these charges. Sentencing was deferred pending a pre-sentence investigation. Up to that point, Ong was represented by a public defender, but in early June, 1998 hired Christina Gutierrez, one of Baltimore's most high-profile and respected criminal defense attorneys. Ong asserted that he hired Gutierrez to strike the guilty plea and defend him in a trial. Ong paid Gutierrez $14,705.99 (of what was likely a $15,000 fee).

Gutierrez (and her associate) provided legal services to Ong. They filed several pleadings on Ong's behalf, responded to pleadings filed by the State, but never filed a motion to strike the guilty plea. Gutierrez also had numerous consultations with Ong while incarcerated and discussed the evidence against him. Gutierrez also attended the December 1998 sentencing, an event at which Ong never complained that he wanted the guilty plea stricken. Ong was incarcerated.

In May, 2001, Gutierrez consented to disbarment involving sixteen charges of professional misconduct, including an allegation of misappropriation of funds paid by clients which were intended to be paid to third parties on behalf of clients. Ong's allegations against Gutierrez were not made until two weeks after her disbarment, after he read about it in the newspaper. Gutierrez died in January 2004.

In February 2002, the Trustees of the Maryland Client Protection Fund considered a claim filed by Ong in which he asserted that Gutierrez had stolen the retainer he paid her.

Based on the evidence before them—which did not include a copy of the fee agreement—the Trustees denied the claim. The Trustees believed that Ong's claim involved a contractual fee dispute, negligence, or disciplinary violations, but not the required element of defalcation.

In June 2002 the Trustees reconsidered the claim at Ong's request, but denied it again for the same reasons.

In accordance with the provisions of the Maryland court rules relating to the Fund, Ong sought judicial review of the Trustees' decision in Maryland's highest court, the Court of Appeals. The Court of Appeals declined to entertain the case, believing that its own rule (adopted some 36 years earlier) impermissibly extended to it the appellate jurisdiction to review decisions of the Trustees. Accordingly, in November, 2002, the Court of Appeals "transferred" the proceedings to the trial court of general jurisdiction where Ong "resided", the Circuit Court for Washington County.

In October 2003, the circuit court entered an order with the consent of the parties that remanded this matter to the Trustees for further proceedings consistent with the newly revised court rules relating to a review of the decisions of the Trustees. The circuit court also permitted either party to supplement the record by January 2004.

Ong did not supplement the record with any further evidence to support the allegation of defalcation and in March, 2004, the Trustees issued a memorandum decision denying the claim once again. This time, Ong filed a petition for judicial review of that decision with the circuit court, a procedure required by the newly adopted court rules noted above.

In May, 2005, Ong, escorted by prison guards, appeared at the circuit court hearing and made oral argument. In an oral opinion from the bench affirming the decision of the Trustees, the circuit court noted the standard of review which it must apply, citing Maryland Rule 16-811(i)(2):

On any judicial review, the decision of the trustees shall be deemed *prima facie* correct and shall be affirmed unless the decision was arbitrary, capricious, unsupported by substantial evidence on the record considered as a whole, beyond the authority vested in the trustees, made upon unlawful procedure, or unconstitutional or otherwise illegal.

Ong noted an appeal to Maryland's intermediary appellate court, the Court of Special Appeals, and on August 17, 2006 that court also affirmed Trustee's denial of the claim. In the only written appellate decision in this matter, the Court of Special Appeals wrote:

… the exhibits submitted by Ong merely established that he paid Gutierrez a sum of money for representation in the Howard County criminal case and that she rendered services on his behalf. Gutierrez's correspondence indicated that the money received was a flat fee and services were provided. Ong, of course, contends otherwise, but *the evidence submitted and the record as a whole does not mandate a finding that there was a defalcation rather than a fee dispute between Gutierrez and Ong*.

Ong v. Client Protection Fund of the Bar of Maryland, Court of Special Appeals No. 724, Sept. Term, 2005, Slip Opinion, 17 Aug 06, (Kenney, J.) at 18-19 (unpublished) (emphasis added).

Undaunted, Ong filed a petition for a writ of *certiorari* with the Court of Appeals. The petition was denied on December 8, 2006. Subsequent to that disposition, Ong filed a petition for *certiorari* with the United States Supreme Court and that petition was denied on May 14, 2007. As of this writing, there is a chance that this litigation might be over.

▶*Mr. Ottey is Counsel to the Client Protection Fund of the Bar of Maryland.*

Wisconsin Rule Change—Failure to Refund Unearned Fee as Dishonest Conduct

By Kris Wenzel

The definition of "dishonest conduct" within the Wisconsin Lawyers' Fund for Client Protection (WLFCP) now officially includes the failure to refund an unearned advance fee. The petition requesting the revision was approved by The Wisconsin Supreme Court and became effective July 1, 2007 as part of a joint petition filed by the Wisconsin Office of Lawyer Regulation (OLR) and the State Bar of Wisconsin (SBW).

While the WLFCP Committee has long considered the failure to refund an unearned advance fee to be dishonest conduct, it has now been solidified within the Rules (SCR 12.045 Definitions). Since the WLFCP was created in 1981, it has approved 572 claims involving 128 attorneys totaling $3.7 million. Of that amount, 395 claims involving 70 lawyers have been for failure to refund unearned advance fees, for a total of $615,958.

The revision to the definition of dishonest conduct came about courtesy of the SBW Trust Account Working Group, appointed by then State Bar President Michelle Behnke to propose revisions to the Supreme Court rules affecting trust accounts.

Proposed amendments that would have tied a client's ability to obtain payment from the WLFCP to the existence of a fee arbitration award or a court order were not pursued lest there be an increase to hurdles clients need to clear in order to obtain refunds of unearned fees.

A new trust account reporting rule, which incorporates the WLFCP and the SBW's fee arbitration program, emerged as SCR 20:1.15(b)(4m) Alternative Protection for Advanced Fees**.** It allows lawyers to deposit advanced fees into the lawyers' business accounts only upon several conditions. The writing required must contain language informing the client that:

• the lawyer is obligated to refund any unearned advanced fee at the end of the representation;

• the lawyer will submit any dispute regarding a refund to binding arbitration, such as the programs run by the State Bar of Wisconsin and Milwaukee Bar Association, within 30 days of receiving a request for refund; and,

• the lawyer is obligated to comply with an arbitration award within 30 days of the award.

It should be noted that the client is not obligated to arbitrate the fee dispute and may elect another forum in which to resolve the dispute. The writing must also inform the

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The New Face of Client Protection in Canada

By Victoria Rees

Client protection issues have become a top priority for Canadian jurisdictions over the past few years. A new National Mobility Agreement was implemented in 2002-2003, and has now been ratified by all Canadian Provinces. It establishes a protocol for temporary and permanent mobility across Canada. The agreement provides, among other things, procedures for dealing with discipline complaints, insurance claims and client compensation claims arising from lawyers practicing in 'host' as opposed to their 'home' provinces.

As a result of the diversity among client protection fund limits, philosophies and procedures across the country, a national task force was created through the Federation of Law Societies of Canada, to make recommendations with respect to mechanisms for "leveling the playing field" for client protection in Canada.

Following significant losses to the client protection funds in Nova Scotia, Newfoundland, Manitoba and Alberta in the past few years, a number of Canadian provinces have joined together to pool risk and create a reciprocal insurance program to cover catastrophic losses. The Canadian Lawyers Insurance Association implemented in May 2006 Part C of the lawyers' professional liability insurance policy, which provides coverage from the self-retention amount of $100,000 to $10 million for each participating jurisdictions. Each province retains authority and discretion to pay claims within the parameters of the insurance policy. This has resulted in the elimination of payout 'caps' such as the previous limit in Nova Scotia of $300,000 per lawyer and $750,000 per year, and also serves to level out the amount of levies paid each year by members. The new coverage is paid for through increased compensation fund levies on members each year, but has, in fact, reduced the levies as compared to those which would have had to be paid to replenish the fund in Nova Scotia after a $1.4 million defalcation in 2005.

In addition, significant attention is being paid to developing enhanced means for risk identification and management on a national basis. The four Atlantic Provinces of Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island implemented uniform trust account rules in 2004, and have been working cooperatively on trust account safety issues. Most provinces have enhanced their trust audit programs, and we are sharing information about the results of those audits and areas of proactive education. At the 2006 National Discipline Conference, a program was offered by the police and the Law Society of Upper Canada's Mortgage Fraud Team to assist provinces in recognizing and effectively addressing the increasing problem with mortgage fraud. In Nova Scotia, a new Land Registration Act Compensation Fund has been created, separate from the main Client Compensation Fund, to respond to claims arising from fraud or dishonesty in the new electronic land registration system.

By developing best practices in loss prevention as well as in providing compensation for victims of lawyer theft, we hope to improve public protection, and the level of trust for the legal profession and regulators.

▶ *Ms. Rees is the Director of Professional Responsibility with the Nova Scotia Barristers' Society, former Vice-President for Canada for NCPO, and Chair of the International Bar Association's Professional Ethics/Client Protection Committee.*

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Wisconsin Rule CONTINUED FROM PAGE 7

client of the opportunity to file a claim in the event an unearned advanced fee is not refunded, and should provide the address of the Wisconsin Fund.

▶ *Ms. Wenzel is Fund Administrator for the Wisconsin Lawyers' Fund for Client Protection.*

PA Fund CONTINUED FROM PAGE 4

the debtor/attorney was clearly entrusted with the funds. Interestingly, the debtor/attorney never denied that an entrustment existed. His only defense was the statute of limitations.

The U.S. District Court affirmed the Bankruptcy Court's decision, finding no error of law in discharging the obligation, nor any clearly erroneous findings of fact by the Bankruptcy Court. The Fund's Board has decided not to expend any more funds on legal fees to appeal this decision, and will rely on Rule 531 to recoup the awards paid.

At this writing, the Fund is involved in litigation with another debtor/attorney before a different Bankruptcy Judge in the Western District. Here, the *Baillie* decision is being used to argue that any fees paid were not entrusted funds, and that claims paid by the Fund to former clients should be discharged.

▶ *Ms. Peifer is Executive Director of the Pennsylvania Lawyers Fund for Client Security.*

Plan to attend NCPO's Annual meeting Friday morning, May 30th, in conjunction with the ABA National Forum in Boston!

In Memorium
Gilbert A. Webb, Esquire